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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

In re DESTINY G. et al.,

Persons Coming Under the Juvenile Court Law.

B258762
(Los Angeles County
Super. Ct. No. DK06504)

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

DANIEL G.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, Sherri Sobel, Juvenile Court Referee. Reversed in part, Affirmed in part and remanded.

Maureen L. Keaney, under appointment by the Court of Appeal, for Defendant and Appellant.

Mark J. Saladino, County Counsel, Dawyn R. Harrison, Assistant County Counsel, and Sarah Vesecky, Deputy County Counsel, for Plaintiff and Respondent.

Daniel G. (Father) appeals from the juvenile court's jurisdictional and dispositional orders regarding his children, Destiny G. (born August 2010) and Emily G. (born December 2011). He challenges the court's findings that his alleged marijuana use placed the children at risk of physical harm pursuant to Welfare and Institutions Code section 300, subdivision (b)¹ and that he failed to protect the children from marijuana abuse by their mother, Gabriela L. (Mother).² Father further contends that his due process rights were violated at the jurisdictional hearing when counsel for the children requested the petition be conformed to proof that he failed to protect the children. We find that the court's findings regarding Father are not supported by substantial evidence. We therefore reverse the order finding dependency jurisdiction insofar as it is based on the allegations against Father.

FACTUAL AND PROCEDURAL BACKGROUND

Detention

The family came to the attention of the Los Angeles County Department of Children and Family Services (DCFS) in May 2014, when the department received a referral that Destiny and Emily had been seen outside alone wearing dirty diapers, with lice in their hair and dirty faces. Father and Mother had been separated for several years, and the children lived with Mother. Mother and the children lived with maternal aunt Patricia L., maternal grandmother Isidora G.,

¹ All undesignated section references are to the Welfare and Institutions Code.

² Mother is not a party to this appeal.

maternal step-grandfather Santiago M., and Mother's 10-year-old brother Francisco and kindergarten-aged brother Angel.³

Francisco told the caseworker he often was left alone in the house to care for his nieces. He also stated that Mother smoked marijuana to treat pain in her bones.

June 2014 medical examinations of both children revealed no evidence of physical abuse, although the report noted the children suffered from "[p]oor hygiene" and that Destiny had "flaky dry skin" and her feet were black. Mother, Patricia L., and the children moved out of the maternal grandparents' home in July 2014.

In July 2014, the caseworker contacted Father and advised him that DCFS was investigating child abuse allegations. When asked if he had any concerns about the children, Father replied that he did not and said that when the children had visited him the week before, they wanted their mother at the end of the day. He stated that Mother showed the children "good love."

Father reported that he lived with his brother Juan B. and sister-in-law Lourdes S. He denied that Mother used marijuana or that she did not care for the children properly. Father admitted using medical marijuana to help him sleep and to treat back pain. He gave the caseworker a copy of his medical marijuana card and stated that he kept the marijuana in a locked chest on top of his closet.

Father stated that he was raised by his older brother and sister-in-law after his mother passed away when he was seven years old. However, he was physically abused by his sister-in-law and therefore was placed in foster care for five years

³ Francisco and Angel subsequently were removed from the home based on reports of abuse and neglect by their parents, Isidora and Santiago.

before being adopted at age 17 by his cousin Janet C.⁴ Father wanted Janet C. to take Destiny and Emily if they were removed from Mother, and Janet C. stated that she was willing to take them.

The children were detained and placed in foster care. The court ordered reunification services, monitored visits with Mother, and unmonitored visits with Father, conditioned on his marijuana levels decreasing.

Section 300 Petition

On July 23, 2014, DCFS filed a petition under section 300, subdivisions (a) and (b), containing numerous allegations regarding Mother, the maternal grandfather, and the maternal aunt. As pertinent to this appeal, the petition alleged that Father's use of marijuana rendered him incapable of providing regular care for the children (count b-7). At the jurisdictional hearing, the dependency court granted the motion of the children's counsel to amend the petition to conform to proof that Father failed to protect the children from Mother's marijuana abuse, thus endangering the children and placing them at risk of physical harm.

Jurisdiction and Disposition Report

The August 13, 2014 jurisdiction/disposition report stated that Father did not know anything regarding the allegations that Mother abused marijuana or forced Francisco to care for the children. He had never seen Mother use marijuana. He expressed the opinion that the maternal grandfather was an alcoholic and "a bad guy," but he did not know anything about the maternal aunt. He denied using marijuana in the children's presence, adding that he had a medical marijuana

⁴ The brother with whom Father lived was not the same one whose wife abused him.

license but had stopped using it because of the children. Father worked for One Stop Clothing and lived in a house with some family members. He and Mother reported having a good relationship and expressed the desire that the children remain with either one of them. Father had been unable to visit the children since July 23 because of “mandatory overtime and 12 hour shifts” at work, but he planned to visit them on August 2. Father’s July 2 drug test was negative.

Janet C. expressed interest in caring for the children but she was not considered because she reported that she had a 2011 DUI arrest.

DCFS recommended family reunification services and the requirement of six consecutive clean drug tests for Father.

Jurisdictional Hearing

Francisco, who was 10 years old at the time of the hearing, testified that Mother smoked marijuana and left him to take care of the children, although he acknowledged that maternal grandfather was always with them when Mother left. He stated that she would leave for approximately 20 minutes at a time to smoke in the alley behind the house. If he needed Mother, he would run to the alley to get her. Mother sometimes smoked in front of the house, but not inside the house.

Francisco testified that Father drank a lot and did not take good care of the children. However, Francisco acknowledged that he was never present when Father was with Emily and Destiny because Father did not visit the children in his house. He thought that the children visited Father for about two days at a time and when they returned, “they were nice but . . . they were very hungry.” He testified that he heard Father and Mother fight over the phone about the children.

Francisco further testified that maternal aunt once taped Emily and Destiny to a chair and took pictures of them. Destiny was crying, but Emily was “just worried.”

Mother testified that she smoked marijuana in the alley several times a day for arthritis pain, but she left the children with her father or mother, not with Francisco. She acknowledged arguing with Father over the telephone, but not in the children’s presence.

Janet C. testified that she saw the children every other week when they visited Father. When the children visited, they looked fine. They were dressed appropriately, were not dirty, did not have dry skin, and never indicated that they were hungry. Father fed the children, gave them naps, played with them, and took them to the park or to visit family members.

Janet C. had never seen Father under the influence of drugs or alcohol during their visits. If the children were placed with Father, he would move into Janet C.’s home, which had childcare nearby. She testified that she had not dealt with her 2011 DUI because she did not have the money to pay for it. She knew that Father used marijuana when he had difficulty falling asleep, but that he did not smoke when the children were present.

Father stated that when the children visited, he changed their diapers, fed them, cleaned them, and generally took responsibility for them. Their appearance was good when they visited. They were clean, and they did not have any skin conditions that caused him concern.

Father testified that he had received a medical marijuana card two years before the hearing for back pain and to help him sleep. He did not smoke marijuana during the day because of work; he used it approximately four times a week at night only, explaining, “I can’t be high at work.” He stopped using

marijuana when the social worker told him the children might be taken away, stating, “why would I even risk it?” He had never used marijuana when the children were with him.

Father worked in a warehouse from 7:30 a.m. to 4:00 p.m., although he sometimes was required to work overtime, working 12-hour shifts seven days a week. He was unable to visit his children when he worked overtime. He worked out at a gym when he finished work at 4:00 p.m.

Father stated that he did not drink alcohol very often and did not drink during visits with the children. He acknowledged that he and Mother occasionally argued, but described it as “nothing serious.”

Father thought that maternal grandfather was an alcoholic, but Father did not go to Mother’s house often and never went inside. He explained that he did not have a relationship with Mother’s family, stating that when he and Mother exchanged the children, either she dropped them off at his house or he picked them up from outside her house. He and Mother separated in 2011, when she was pregnant.

Father had never used marijuana with Mother and did not know she smoked. He did not learn of her marijuana use until his second encounter with the social worker, after the children were taken from Mother.

Father asked the court to release the children to him pursuant to section 361.2,⁵ stating that he planned to move in with Janet C., who had a spare bedroom

⁵ The statute provides, in pertinent part: “When a court orders removal of a child pursuant to Section 361, the court shall first determine whether there is a parent of the child, with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court *shall* place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child.” (§ 361.2, subd. (a),

for the children. He further argued that he had a babysitter who had “live scanned for the department,” and he had the means to pay for daycare.

After taking testimony, the court found Mother and Father not credible, stating, “I find the only adult in this entire household was the ten-year-old,” Francisco. The court believed “almost every single word [Francisco] said.”

As to the allegations against Father, which concerned only his marijuana use, the court stated, “I am the only living human being in the State of California without a medical marijuana card. I can hardly believe that a young man with a full-time job who is this young, and, by the way, the mother and father [are] both extremely young. . . . I just don’t understand why people without jobs or education are able to get bags and bags and bags of this stuff enough so that the raids come in and they find it in piles all over the house. . . . [¶] [M]arijuana really is even better than alcohol. . . . It is not legal. It costs money. To be able to get a marijuana card because you can’t sleep at 21 or 22 years of age . . . boggles the mind.” The court further noted that Father had “not seen the children since they were removed because he has a job. Now, . . . I get that. His self-esteem is tied up with having a full-time job and it’s important to him that he has that job, that he shows up. He had to . . . prove he could care for his children. I’m with him there. . . . But there has to be some sort of basis in the future to figure out how to also parent these kids.” The court then sustained the allegations, adding the allegation in count b-1 that Father failed to protect the children from Mother’s substance abuse. The court declared the children dependents of the court pursuant to section 300, subdivisions

italics added.) “To comport with due process, the detriment finding must be made under the clear and convincing evidence standard. [Citations.] Clear and convincing evidence requires ‘a high probability, such that the evidence is so clear as to leave no substantial doubt. [Citation.]’ [Citations.]” (*In re C.M.* (2014) 232 Cal.App.4th 1394, 1401 (*C.M.*).)

(a) and (b), and placed them under the care, custody, and control of DCFS. The court ordered Father into a parenting class, stating, “It will be good for him,” and ordered weekly marijuana testing. The court also ordered unmonitored visits for Father, “so long as his marijuana levels were going down.” Father timely appealed.

DISCUSSION

Father challenges the dependency court’s findings sustaining the allegations against him. DCFS urges us to refrain from considering Father’s appeal because jurisdiction over the children is proper based on the unchallenged findings regarding Mother. “However, when, as here, the outcome of the appeal could be ‘the difference between father’s being an “offending” parent versus a “non-offending” parent,’ a finding that could result in far-reaching consequences with respect to these and future dependency proceedings, we find it appropriate to exercise our discretion to consider the appeal on the merits. [Citations.]” (*In re Quentin H.* (2014) 230 Cal.App.4th 608, 613; see also *In re Drake M.* (2012) 211 Cal.App.4th 754, 762-763 (*Drake M.*) [reviewing the father’s appeal, despite the fact that dependency jurisdiction over the child would remain in place because the findings based on the mother’s conduct were unchallenged, citing potential implications for future dependency proceedings and the father’s parental rights].) We therefore exercise our discretion to consider Father’s appeal.

“[S]ection 300, subdivision (b), authorizes the dependency court to assert jurisdiction over a child in a number of circumstances: (1) a child ‘has suffered’ serious physical harm as a result of the failure or inability of his or her parent to adequately supervise or protect the child, (2) ‘there is a substantial risk’ the child will suffer serious physical harm as a result of the failure or inability of his or her

parent to adequately supervise or protect the child, or (3) the child has suffered serious physical harm or there is a substantial risk that the child will suffer serious physical harm ‘by the inability of the parent . . . to provide regular care for the child due to the parent’s . . . substance abuse.’ [¶] In short, there are three elements for jurisdiction under section 300, subdivision (b), namely, (1) neglectful conduct or substance abuse by a parent in one of the specified forms, (2) causation, and (3) serious physical harm to the child, or a substantial risk of such harm. [Citations.]” (*In re Rebecca C.* (2014) 228 Cal.App.4th 720, 724-725 (*Rebecca C.*)). “[DCFS] has the burden to prove the jurisdictional facts by a preponderance of the evidence. [Citations.]” (*In re D.C.* (2011) 195 Cal.App.4th 1010, 1014.)

“‘We review the juvenile court’s jurisdictional findings for sufficiency of the evidence. [Citations.] We review the record to determine whether there is any substantial evidence to support the juvenile court’s conclusions, and we resolve all conflicts and make all reasonable inferences from the evidence to uphold the court’s orders, if possible. [Citation.] “However, substantial evidence is not synonymous with any evidence. [Citations.] A decision supported by a mere scintilla of evidence need not be affirmed on appeal. [Citation.] Furthermore, ‘[w]hile substantial evidence may consist of inferences, such inferences must be “a product of logic and reason” and “must rest on the evidence” [citation]; *inferences that are the result of mere speculation or conjecture cannot support a finding* [citations].’ [Citation.] ‘The ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record.’ [Citation.]” [Citation.]’ [Citation.]” (*Drake M., supra*, 211 Cal.App.4th at p. 763.)

“It is undisputed that a parent’s use of marijuana ‘*without more*,’ does not bring a minor within the jurisdiction of the dependency court. [Citation.]” (*In re Destiny S.* (2012) 210 Cal.App.4th 999, 1003 (*Destiny S.*); see also *Drake M.*,

supra, 211 Cal.App.4th at p. 764 [“We have previously stated that without more, the mere usage of drugs by a parent is not a sufficient basis on which dependency jurisdiction can be found.”].) Instead, DCFS bears the burden of showing by a preponderance of the evidence that there is “a specific, nonspeculative and substantial risk to [the children] of serious physical harm.” (*Destiny S.*, *supra*, 210 Cal.App.4th at p. 1003; *In re S.O.* (2002) 103 Cal.App.4th 453, 461 [agency has burden of establishing substantial risk of serious harm by preponderance of the evidence].)

Under section 300, subdivision (b), “jurisdiction based on ‘the inability of the parent or guardian to provide regular care for the child due to the parent’s . . . substance abuse,’ must necessarily include a finding that the parent at issue is a substance *abuser*. [Citation.]” (*Drake M.*, *supra*, 211 Cal.App.4th at p. 764.) There was no evidence presented here that Father abused marijuana. The evidence of Father’s marijuana use was his own testimony that he had a medical marijuana card, kept the marijuana locked in a chest on top of his closet, never used it during his children’s visits, only used it at night because he could not “be high at work” during the day, and stopped using it after learning the children might be taken away. Similarly, Janet C. testified that Father did not smoke marijuana when the children were present.

We acknowledge that the dependency court found Father not credible and did not address Janet C.’s credibility. Nonetheless, DCFS did not put forth any evidence that Father abused marijuana. (*Rebecca C.*, *supra*, 228 Cal.App.4th at p. 728; compare *In re Alexis E.* (2009) 171 Cal.App.4th 438, 441-442, 449 (*Alexis E.*) [citing evidence that the father smoked marijuana in the children’s presence].) Francisco, whose testimony the court did find credible, nowhere testified that Father used marijuana or was unable to care for the children as a result of his

marijuana use. Francisco expressed the opinion that Father did not take good care of the children, but he acknowledged that he actually was never present during Father's visits with Destiny and Emily. DCFS did not submit any evidence, for example, that Father was ever arrested for marijuana use or that his marijuana use adversely affected any aspect of his life. Simply put, DCFS presented no evidence to establish that Father abused marijuana.

The court's statement regarding "bags and bags and bags" of marijuana discovered during "raids" is nowhere supported by the evidence. DCFS did not submit any evidence that Father's house was "raided," leading to the discovery of "piles [of marijuana] all over the house." DCFS presented no evidence that Father fraudulently obtained his medical marijuana card or that he used marijuana in any situations other than to help him sleep.

Nor is there any evidence of causation – that is, that Father "failed or was unable to adequately supervise or protect" the children as a result of his marijuana use. (*Drake M.*, *supra*, 211 Cal.App.4th at p. 768; *Rebecca C.*, *supra*, 228 Cal.App.4th at p. 725.)

DCFS presented no evidence to establish that Father's marijuana use rendered him unable to care for the children or that his use led to a "specific, nonspeculative and substantial risk to [the children] of serious physical harm." (*Destiny S.*, *supra*, 210 Cal.App.4th at p. 1003; see also *Rebecca C.*, *supra*, 228 Cal.App.4th at p. 728 [rejecting DCFS's argument that the mother's substance abuse presented a risk of harm simply because "[t]he risk to a child being cared for by a parent under the influence of [methamphetamine, amphetamine and marijuana] is not speculative,"] stating that this argument "excises out of the dependency statutes the elements of causation and harm"]; *In re David M.* (2005) 134 Cal.App.4th 822, 830 [although the record showed that the mother suffered

from a substance abuse problem and both parents had mental health issues, the agency “offered no evidence that these problems caused, or created a substantial risk of causing, serious harm” to the children[.]”)

The only evidence that Father did not adequately care for his children was Francisco’s opinion that Father was not a good parent and that they returned from his house hungry; however, Francisco acknowledged that he was not present when Father visited with Destiny and Emily. Even crediting Francisco’s testimony, he did not testify about Father’s alleged marijuana use. There is simply no evidence showing that Father was unable to care for his children or that they were at risk of serious physical harm when he cared for them.

The evidence here is very different from the evidence presented by the agency in *Alexis E.* There, the mother testified that the father used marijuana in the children’s presence, and one of the children reported not enjoying visits to the Father because he smoked marijuana while they were there. (*Alexis E.*, *supra*, 171 Cal.App.4th at pp. 441-442.) In addition, there was evidence that the father’s marijuana use had “a negative effect on his demeanor towards the children and others.” (*Id.* at p. 453.) There was testimony that when the father smoked marijuana, he was irritable and impatient with the children, as well as violent toward his girlfriends. By contrast, here, there was no evidence presented to establish that Father’s marijuana use affected his ability to care for his children.

Similarly, there is no evidence to support the allegation in count b-1, that Father failed to protect the children from Mother’s alleged substance abuse. Father repeatedly denied knowing that Mother used marijuana. Indeed, the undisputed fact that he and Mother had been separated for three years supports his claim that he had never seen Mother smoke marijuana. Francisco did not testify that Father ever saw Mother use marijuana, and DCFS presented no evidence to support such

a finding. Francisco testified that Mother smoked in the alley behind the house and occasionally in front of the house, but he did not testify that Father ever saw Mother smoking marijuana or was present when Mother was smoking.

DCFS argues that Father's failure to protect his children is established by evidence that Father knew the maternal grandfather had a drinking problem and was a "bad guy." We are not persuaded. Contrary to DCFS' contention, the allegation that Father failed to protect the children is in count b-1 and thus is based on the allegation that Mother abused marijuana, not on allegations regarding the maternal grandfather or other conditions in Mother's home. As discussed above, DCFS presented no evidence that Father knew that Mother used marijuana.

Moreover, even if the allegation in count b-1 was that Father failed to protect the children from conditions in Mother's home other than her marijuana use, the evidence on which DCFS relies is too speculative to support jurisdiction. The inference that Father failed to protect the children from risk of physical harm because he knew that the maternal grandfather drank too much and was a "bad guy" is a product of speculation, not ""a product of logic and reason."" (*Drake M.*, *supra*, 211 Cal.App.4th at p. 763.) In sum, the findings in this case regarding Father are not supported by substantial evidence.⁶

The court did not address Father's request that the children be released to him pursuant to section 361.2, which requires placement with a noncustodial parent who requests custody unless the court finds by clear and convincing evidence that the placement would be detrimental to the child. (*C.M.*, *supra*, 232

⁶ In light of our conclusion that the findings are not supported by the evidence, we need not address Father's contention that the amendment of the petition, adding the allegation that he failed to protect the children from Mother's substance abuse, violated his due process rights.

Cal.App.4th at p. 1401.) There is no requirement that the noncustodial parent be “nonoffending” to be considered for placement under section 361.2. (*In re D’Anthony D.* (2014) 230 Cal.App.4th 292, 298 (*D’Anthony*).)⁷ Moreover, the statute requires the dependency court to consider a noncustodial parent’s request for custody under section 361.2. “Section 361.2, subdivision (c) provides that ‘[t]he court *shall* make a finding either in writing or on the record of the basis for its determination under subdivisions (a) and (b).’” (*In re Abram L.* (2013) 219 Cal.App.4th 452, 461, italics added.) “[I]t is inappropriate to make implied findings when the juvenile court fails to make express findings as required by section 361.2, subdivision (c).” (*Id.* at p. 463.) Here, as in *Abram L.*, “[n]othing in the record indicates that the juvenile court considered the requirements of section 361.2 in determining whether to deny father’s request for physical custody of” Destiny and Emily. (*Id.* at p. 461.) Because the clear and convincing standard of section 361.2 is a higher standard of proof than the preponderance of the evidence standard required for jurisdictional findings, the court erred in failing to make the requisite findings under section 361.2.⁸ (*C.M., supra*, 232 Cal.App.4th at p. 1401.)

⁷ The court in *D’Anthony* explained: “Because a jurisdictional finding need only be made under the preponderance of evidence standard, reading a nonoffending requirement into section 361.2 will effectively undermine the mandate that there be clear and convincing evidence of detriment before placement with a noncustodial parent can be denied. Such a result, and its consequences for all proceedings following the dispositional stage, does not comport with constitutional due process. [Citations.]” (*D’Anthony, supra*, 230 Cal.App.4th at p. 302, fn. omitted; see also *C.M., supra*, 232 Cal.App.4th at p. 1401 [if the court fails to place the child with the noncustodial parent without applying the clear and convincing standard of proof, the noncustodial parent’s rights could subsequently be terminated “‘without the question of possible detriment engendered by that parent ever being subjected to a heightened level of scrutiny’”].)

⁸ Even if the court’s jurisdictional findings had been supported by substantial evidence, these findings did not disqualify Father from obtaining custody under section 361.2. As explained in *D’Anthony*, if the jurisdictional findings were sufficient to satisfy

DISPOSITION

The judgment is reversed as to the jurisdictional findings that pertain to Father (counts b-1 and b-7). The orders requiring Father to undergo drug testing and parenting classes are reversed and the case remanded for the court to consider Father's request to place the children with him under section 361.2. In all other respects the judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, Acting P.J.

We concur:

MANELLA, J.

COLLINS, J.

section 361.2, "the heightened clear and convincing evidence standard would disappear, having been supplanted by the lower preponderance standard used to make the earlier jurisdictional findings. This has serious constitutional ramifications, because 'the trial court's decision at the dispositional stage is critical to all further proceedings.' [Citation.]" (*D'Anthony, supra*, 230 Cal.App.4th at p. 301.)